

HOGAN & HARTSON
L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910
WWW.HHLAW.COM

January 16, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: Year 2000 Biennial Regulatory Review
Amendment of Part 22 of the Commission's Rules
WT Docket No. 01-108
Written *Ex Parte* Communication**

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, I write on behalf of American Honda Motor Co., Inc., ATX Technologies, Inc., Audi of America, Deere & Company, General Motors Corporation, Mercedes-Benz USA, LLC, OnStar Corporation, Rural Cellular Association, Toyota Motor North America, Inc. and Volkswagen of America to respond to a December 31, 2003 *ex parte* letter filed by AT&T Wireless Services, Inc. ("AWS") in the above-referenced proceeding. AWS has filed a Petition for Reconsideration of the Commission's *Part 22 Order*, [1/](#) which provided for a five-year sunset of the analog cellular requirement contained in 47 C.F.R. §§ 22.901(d) and 22.933. AWS's Petition seeks to reduce the five-year transition period to a mere 30 months. As discussed below, AWS's recent *ex parte* is incorrect in suggesting that hearing aid users would have adequate access to digital services by this much earlier analog requirement sunset date. AWS's proposal:

[1/](#) Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, Report and Order, 17 FCC Rcd 18401 (2002) (*"Part 22 Order"*).

(1) would leave hearing aid users with extremely limited choices in handset functionality and costs; (2) would ignore the need to ensure digital wireless access for telecoil users; and (3) is based on the questionable assumptions that manufacturers will be able to meet the first benchmark deadline established in the Hearing Aid Compatibility order (“*HAC Order*”) ^{2/} and that compliance with the ANSI C63.19 standard will necessarily result in hearing aid-compatibility. AWS’s *ex parte* also ignores the fact that the Commission justified the five-year sunset based on the needs of emergency-only users in addition to hearing aid users, and that it found that a five-year sunset period would also satisfy the concerns of telematics users and roaming-dependent regional wireless carriers. Finally, the AWS proposal would upset the investment-backed expectations of those consumers and service providers that have, consistent with the Commission’s *Part 22 Order*, relied on the continued existence of the analog network at least through February 18, 2008, and render existing analog-based equipment prematurely obsolete.

An August 2005 Sunset Would Provide Insufficient Time to Ensure that Hearing Aid Users Have Adequate Access to Digital Handsets Prior to the Elimination of Analog Service

In its filing, AWS suggests that the issuance of the Commission’s *HAC Order* somehow justifies moving up the sunset of the analog cellular requirement by two and one-half years, *i.e.*, to August 2005. Nothing in the *HAC Order* supports this position. First, AWS implies that the Commission made a new determination in the *HAC Order* that hearing aid-compatible phones are “now available.” In fact, the Commission was already aware when it issued the *Part 22 Order* that “a small number” of digital phones were hearing aid-compatible. ^{3/} Thus, the *HAC Order* broke no new ground by stating that “some” ^{4/} or “a number of” ^{5/} hearing aid-compatible digital phones are on the market. AWS cited references to only three manufacturers that purportedly have hearing aid-compatible phones. ^{6/} Moreover, nothing in the *HAC Order* would contradict a conclusion that only a very small

^{2/} Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, 18 FCC Rcd 16752 (2003) (“*HAC Order*”).

^{3/} *Part 22 Order* at ¶ 26.

^{4/} *HAC Order* at ¶¶ 48, 56, 71.

^{5/} *HAC Order* at ¶ 15. The *HAC Order* did not quantify what constituted “a number.” Moreover, the *HAC Order*’s reference to such phones was based on a 1999 study, of which the Commission would have been already aware when it adopted the five-year analog sunset.

^{6/} AWS *Ex parte* at n.10.

percentage of all digital wireless phones are hearing aid-compatible, ^{7/} or that the availability of such phones has not increased appreciably since the issuance of the *Part 22 Order*.

Second, AWS argues that the analog cellular sunset should be shortened because all wireless carriers will be required, pursuant to the *HAC Order*, to offer a minimum of two compatible handsets within two years. ^{8/} AWS apparently believes that this should be enough for hard of hearing consumers. As explained by Self Help for Hard of Hearing People (“SHHH”), however, consumers with hearing loss – who represent 10% of the U.S. population – want access to “a variety of compatible products, in varying price ranges and functions,” ^{9/} such that they can enjoy “the full panoply of digital services that are available to hearing consumers.” ^{10/} Indeed, SHHH recently indicated that it considered filing a petition for reconsideration of the 2005 benchmark set in the *HAC Order* because it felt that the benchmark provided an inadequate level of access. ^{11/} Having a choice of two handsets (per wireless interface per carrier), or even of 25% of the handsets offered (as required for Tier 1 carriers), simply does not provide hearing-impaired consumers with “the full panoply of digital services that are available to hearing consumers.” Moreover, the requirement to offer at least two compatible handsets within two years will not, by itself, satisfy the Commission’s intent that persons with hearing disabilities not “be limited to a small number of product offerings.” ^{12/}

AWS’s *ex parte* also ignores the important fact that the *HAC Order*’s 2005 benchmark deadline only requires wireless carriers to sell handsets that satisfy the

^{7/} To put the numbers in perspective, AWS alone offers some 35 handsets on its website. See <http://www.attwireless.com>.

^{8/} AWS has proposed that the analog cellular period be reduced from five years to 30 months, which would put the sunset date at August 2005. The first benchmark deadline under the HAC Act does not occur until November 2005. See 68 Fed. Reg. 54173 (establishing the effective date of the *HAC Order* as Nov. 13, 2003). Thus, even the minimum obligations required by the first HAC benchmark would not yet be in effect by AWS’s suggested analog sunset date.

^{9/} SHHH Comments, WT Docket No. 01-309 (Jan. 11, 2002) at 10.

^{10/} *Id.* at 7.

^{11/} See Comments of SHHH, WT Docket No. 01-309 (Dec. 12, 2003) (“SHHH advocated all along for full removal of the exception for wireless telephones from the HAC Act. The FCC came through with a partial lifting of the exemption . . . Did we consider submitting a Petition for Reconsideration for a 100% benchmark? Absolutely we did.”).

^{12/} *HAC Order* at ¶ 30.

“U3” rating under the ANSI C63.19 standard. Users who rely on telecoils – typically persons with profound hearing loss – will require handsets that meet the “U3T” rating. [13/](#) The *HAC Order* does not require the sale of U3T handsets until a year later – November 2006. Thus, under AWS’s proposal, there would be no requirement that telecoil users be accommodated once analog service is eliminated.

AWS’s argument – that an adequate number of hearing aid-compatible handsets will be available by 2005, pursuant to the first benchmark established by the *HAC Order* – is also based on an assumption that handset manufacturers will be able to meet the deadline. Such an outcome, however, is far from certain. [14/](#) For example, a group of rural cellular providers has expressed concern that, due to the decline of industry support for the TDMA interface, U3 handsets will not be available for those carriers that continue to operate TDMA networks. [15/](#) More importantly, as Sprint warns, “it is generally acknowledged that the C63.19 standard will be modified in the next year” and “the Commission should not be surprised if handset vendors . . . must seek waivers of the deadlines established.”[16/](#)

Nevertheless, even accepting the assumption that manufacturers will be able to produce handsets that satisfy the U3 rating by the 2005 deadline, it is still unclear to what extent U3-rated handsets will actually be compatible with most hearing aids – a hotly contested issue in the HAC proceeding record. [17/](#) Nokia

[13/](#) See *HAC Order* at ¶¶ 5, 48. Approximately 25-30% of hearing aids sold include telecoils. *Id.* at ¶ 5.

[14/](#) Indeed, in its comments filed two years ago in the HAC proceeding, AWS asserted that “there is no known, or presently foreseeable, technical solution” to ensure mobile handset compatibility with hearing aids. Comment of AT&T Wireless Services, WT Docket No. 01-309 (Jan. 11, 2002) at 3. It is not clear from AWS *ex parte* if the company has revised its position on this point.

[15/](#) See Public Service Cellular, Inc. *et al.*, Petition for Reconsideration, WT Docket No. 01-309 (Oct. 16, 2003). Cingular Wireless has confirmed that by 2005 it will offer no new TDMA handsets or updates to existing handsets. See Cingular Wireless Reply Comments, WT Docket No. 01-309 (Dec. 1, 2003) at 2.

[16/](#) Sprint Comments, WT Docket No. 01-309 (Dec. 1, 2003) at 3. See also, CTIA, Petition for Reconsideration, WT Docket No. 01-309 (Oct. 16, 2003) at i (“record evidence demonstrates that additional testing of the ANSI C63.19 is necessary”).

[17/](#) See *HAC Order* at ¶ 55 (recognizing that commenters have asserted that the ANSI C63.19 standard “is not a perfect tool for ensuring that any given hearing aid will work with a particular wireless phone”). See also Hearing Aid Industries Association, Written *Ex parte* Communication, WT Docket No. 01-309 (July 2, 2003) at 2 (“Because your hearing aids are custom made to fit your ears, the rating of your basic model under the ANSI

stated on the record that even though several of its phones achieved a U3 and/or U3T rating, problems with the standard resulted in a conclusion that “we cannot be confident that any results we have obtained are reliable indicators of our products’ true performance,” and that the standard “may not guarantee customer satisfaction in practical use.” [18/](#) Likewise, Motorola noted that in a subjective survey, 70% of hearing aid users found the tested digital handsets that met the U3 standard to be “annoying” or “very annoying.” [19/](#) Even the Commission has recognized the possibility that making hearing aid-compatible handsets available may not go as smoothly as planned. In the *HAC Order*, the Commission instructed staff to prepare a progress report in three years’ time, which it will use to make any adjustments to its rules that might be needed. In the *Part 22 Order*, the Commission established reporting requirements to monitor the availability of compatible digital equipment and made it clear that it was “reserving the right to extend the [analog cellular] sunset period in the event that solutions to hearing aid-compatibility problems are unsatisfactory.” [20/](#) Thus, the mere existence of new HAC rules cannot guarantee that a sufficient number of hearing aid-compatible handsets will actually be available by the end of the five-year analog cellular sunset period, much less in half that time.

It is also noteworthy that, contrary to AWS’s suggestion, the Commission did not rely on the existence of the HAC Act exemption in justifying the five-year analog cellular sunset. The five-year sunset was, instead, established to ensure that hard-of-hearing consumers would continue to have access to mobile phone service during the period in which carriers and handset manufacturers were not making hearing aid-compatible digital handsets available in significant numbers. [21/](#) In the *Part 22 Order* the Commission explicitly recognized that the HAC proceeding was pending and that the Commission might take additional future action – independent of establishing a five-year analog cellular sunset – to promote the availability of hearing aid-compatible digital devices. [22/](#) This acknowledgement, however, did not

standard will not always reflect the interference immunity of your individual hearing aids, and you may still receive interference when using a telephone handset.”).

[18/](#) Nokia, *Ex parte* Presentation, WT Docket No. 01-309 (July 3, 2003) at 1.

[19/](#) Motorola, *Ex parte* Presentation, WT Docket No. 01-309 (Jan. 31, 2003) at 14, 16. *See also* CTIA, Petition for Reconsideration, WT Docket No. 01-309 (Oct. 16, 2003) at 3 (stating that the standard “is a work in progress and is not settled with respect to achieving the desired technical outcome”).

[20/](#) *Part 22 Order* at ¶ 29.

[21/](#) *Id.*

[22/](#) *Id.* at ¶ 32.

indicate that the Commission would be unconcerned with ensuring access by the hard-of-hearing during the time the industry ramps up deployment of hearing aid-compatible digital handsets. More importantly, the *HAC Order* specifically relied on the *Part 22 Order*'s five-year analog sunset date – February 18, 2008 – in setting the date by which 50% of a carrier's digital handset models must meet the U3 rating. Therefore, it is nonsensical to suggest that the *HAC Order* in any way justifies a change in the analog sunset date; indeed, just the opposite is true. If the analog sunset date were moved up by 30 months, the 50% HAC benchmark date would also have to be moved up in order to ensure that the same level of compatible handsets were available to hearing-impaired consumers. Wireless carriers and handset manufacturers would undoubtedly be unable to comply with such an accelerated timetable.

AWS Mischaracterizes the Scope of the Commission's Justifications for the Five-Year Sunset

AWS is simply wrong in asserting that the hearing aid-compatibility issue was the "sole rationale" that the Commission supplied to support the five-year sunset of the analog cellular requirement. [23/](#) In fact, the Commission also based its decision on the need to protect users of 911-only phones, plainly stating that:

We conclude that a transition period is warranted in order to mitigate possible negative effects to emergency-only consumers that might otherwise occur with an immediate elimination of the analog requirement. . . .

Accordingly, we conclude that a five-year sunset period should resolve any issues faced by unsubscribers or 911-only subscribers. [24/](#)

Therefore, even if, as AWS argues, the new requirements in the *HAC Order* alleviated the need for a five-year transition period to protect the interests of the hearing-impaired – which they do not – the five-year sunset would still be justified based on the wholly separate rationale of protecting the ability of emergency-only users to access wireless services.

Moreover, by stating that the Commission "rejected the concerns" of telematics providers, rural cellular and other analog users, [25/](#) AWS ignores the fact that the Commission specifically found that the five-year sunset period being

[23/](#) See AWS *Ex parte* at 1, 2.

[24/](#) *Part 22 Order* at ¶¶ 24, 25.

[25/](#) AWS *Ex parte* at 2.

adopted “should also mitigate any significant impacts that might affect telematics providers.” [26/](#) Similarly, the Commission also recognized that the transition period would mitigate any problems faced by customers of the regional wireless carriers that rely heavily on analog roaming. [27/](#)

A Shorter Sunset Period Would Upset the Investment-Backed Expectations of Users and Providers of Analog-Based Services

Regardless of the Commission’s reasons for initially establishing a five-year sunset, the reality is that consumers and their service providers who use the analog network have, as a result of the Commission’s *Part 22 Order*, relied in their investment, business and other decisions on the continued existence of the analog network, at least through February 18, 2008. Shortening the sunset period at this time would thus upset the legitimate, investment-backed expectations of these individuals and service providers, render existing analog technology useless or less useful and compromise public safety.

As noted in pleadings in this docket, and by NTIA in its request for a five-year sunset, [28/](#) the accelerated sunset period requested by AWS would threaten the existence of emergency telematics services, the overwhelming majority of which are delivered over the analog network. [29/](#) By the end of 2006 there will be 6-7 million

[26/](#) *Part 22 Order* at ¶ 20. The Commission also concluded that that the telematics industry would “make great strides” within the five-year transition period in developing digital devices. *Id.*

[27/](#) *Part 22 Order* at ¶ 17.

[28/](#) In its *ex parte* submission, NTIA noted that both the use of analog by the hearing impaired, and the “life-saving road safety communications” provided by telematics are “applications too significant to be marginalized to rapidly disappearing first generation technology.” Letter from Nancy J. Victory, NTIA to Michael K. Powell, FCC (July 12, 2002) at 3. NTIA determined that “in eliminating the analog cellular requirement, the Commission should establish a transition period to allow for an orderly migration of [hearing aid-compatible mobile handsets and telematics] over to digital technology. Based upon the information in the record, a reasonable transition period would be 5 years. Establishing a sunset date is critical to ensuring that the development and availability of digital hearing impaired solutions and digital telematics systems proceeds at a rapid pace.” *Id.* at 5.

[29/](#) See Opposition of American Honda Motor Co., Inc., *et al.* in WT Docket No. 01-108 (April 1, 2003) at 19-23 (noting that analog service is the only mobile service with the geographic coverage to support telematics; analog service is currently the “state-of-the-art” for transmitting voice and data on the same call, *id.* at 21-23, and that the vehicles and

vehicles and heavy equipment in operation with analog-based telematics. ^{30/} Although the telematics industry is aggressively developing and testing a digital solution and will begin phasing it in over the next several years, ^{31/} the lack of geographic coverage associated with digital networks, ^{32/} the difficulty and cost associated with replacing embedded telematics devices, ^{33/} and the lengthy developmental and validation processes required for the introduction of new telematics equipment ^{34/} make it impossible to ensure the continued reliability of these telematics services with less than a five-year sunset. Moreover, the lengthy design, production and life cycles of the automobiles and heavy equipment in which telematics devices are housed further limits the ability of manufacturers and telematics service providers to manage a shorter transition period. If the Commission reduces the sunset period, investment that has already been made in reliance on the continued existence of analog through February 18, 2008 will be lost or severely diminished in value, and telematics will be significantly less reliable as an emergency service.

There are others who have relied on the existence of a five-year transition period as well. Seventeen million mobile telephone users continue to rely exclusively on analog service ^{35/}, many of them in rural areas where digital service is not available. Although the number of analog-only subscribers is shrinking, there will continue to be a significant number of analog-only users for some time. These users, and the carriers that serve them, have relied on the continued existence of the analog network through February 18, 2008 in securing and providing mobile service, ^{36/} and would be forced to incur substantial additional costs in order to maintain existing coverage if the sunset were to end in August 2005, as requested by AWS. As the Rural Cellular Association has stated in its Opposition to AWS's

equipment in which telematics devices are generally embedded have lengthy design, product development and life cycles).

^{30/} See Digital Transition Coalition, *Ex Parte* Presentation, WT Docket No. 01-108 (Dec. 15, 2003) at 5.

^{31/} See *id.* at 6.

^{32/} Opposition of American Honda Motor Co., Inc., *et al.* at 19-20; *Ex Parte* of Digital Transition Coalition at 2.

^{33/} Opposition of American Honda Motor Co., Inc., *et al.* at 23.

^{34/} See 8th CMRS Competition Report, ¶ 61 (July 14, 2003).

^{35/} *Id.* at 21-23.

^{36/} As noted above, *supra*, the customers of rural carriers currently rely on analog roaming when they are not in rural carrier service areas.

petition, “[q]uite clearly, carriers, especially rural carriers, cannot implement changes overnight. The Commission specifically recognized this fact as it balanced many competing interests and settled on a five-year period as a reasonable transition time.” [37/](#)

The analog network is also used for roaming outside of major metropolitan areas on account of the fact that its geographic coverage is twice that of the digital networks. [38/](#), and AWS provides no suggestions as to how the gap between analog and digital coverage will be closed by the end of a 30-month transition period. If AWS’s request is granted, consumers and carriers who have relied on the continued existence of analog will be left with no viable alternatives for securing the ubiquitous coverage currently provided by analog. Such action could have dramatic negative consequences for consumers, public safety and carriers.

Based on the foregoing, we urge the Commission to reject AWS’s petition and reaffirm the five-year sunset contained in its *Part 22 Order*.

Respectfully submitted,

/s/ Ari Q. Fitzgerald

Ari Q. Fitzgerald

cc: Sheryl Wilkerson
Jennifer Manner
Paul Margie
Sam Feder
Barry Ohlson
John Muleta
Peter Tenhula
David Furth
Linda Chang
Shellie Blakeney

[37/](#) Limited Opposition of Rural Cellular Association in WT Docket No. 01-108 (April 1, 2003) at 2.

[38/](#) See Opposition of Sprint in WT Docket No. 01-108 (April 1, 2003) at 3-4.